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WHEN IS A RELIGIOUS BELIEF RELIGIOUS: *UNITED STATES V. SEEGER* AND THE SCOPE OF FREE EXERCISE

Robert L. Rabin†

The context and content of a recent Supreme Court opinion construing the exemption from military service for conscientious objectors serves as the focal point for consideration of the questions of religious freedom inherent in classifications among systems of religious belief. The author suggests that limitations in favor of theistically-oriented religions must be read with sufficient breadth to encompass unorthodox systems of belief in order to avoid conflict with the constitutional guarantees of religious freedom.

On March 8, 1965, the Supreme Court, in *United States v. Seeger*,¹ added its voice to a dialogue which has endured between Congress and the lower federal courts for the past twenty-five years. For the first time, the Court undertook to construe a perpetually troublesome provision: the conscientious objector exemption from military service.² Questions of the scope of religious freedom are generally controversial and the present problem is no exception. The opinion of the Court, while purporting to be solely an examination of congressional intent, assumes larger proportions.

It is obvious that an opposition to the taking of life may have many roots. It can be founded on an interpretation of the Bible,³ or it can be founded on a belief in a Marxian-like interpretation of history⁴—the spectrum is exceedingly wide and the degrees of difference often subtle. Congress has drawn lines, and in doing so has raised questions of freedom of religion. These will become apparent in the discussion of the pre-*Seeger* dialogue. The analysis of *Seeger* suggests some implications of the resolution of this dialogue both in terms of the scope of the conscien-

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¹ 380 U.S. 163 (1965).

² A number of cases have dealt with the question of whether such an exemption is required. See note 59 *infra*. However, the only previous case dealing with the terms of the exemption itself gave the issue short shrift. In holding the 1917 act constitutional, in the Selective Draft Law Cases, 245 U.S. 366 (1918), the Court said with respect to the conscientious-objector exemption therein (see text accompanying notes 5-6 *infra*):

And we pass without anything but statement [of] the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more.

Id. at 389-90.

³ See, e.g., Matthew 5:39-44 (Christ's Sermon on the Mount).

⁴ To one convinced of the historical inevitability of the fall of capitalism it might well seem fundamentally wrong to be forced to go to war to defend the system.

tious-objector limitation and in terms of the dynamics, generally, of interpretation of the constitutional protections afforded freedom of religion. The ensuing discussion then considers the proposed broader doctrine within the context of other cases both decided and undecided.

THE COURTS AND CONGRESS: A DIALOGUE

Conscientious objection to military service has a long and varied history in this country, dating from prerevolutionary days, which will not be detailed here.⁵ Suffice it to say that the exemption afforded to religious objectors by the Selective Service Act of 1917 was the recognition of a long-standing concern for the interest involved. The 1917 act provided that:

[N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations⁶

Two characteristics of this provision are relevant to later considerations. First of all, it should be noted that the exemption is drawn in favor of members of *religious* sects. Common sense suggests the rationale for this limitation. If political objection to a particular war was an acceptable basis for exemption, national security would become in large measure a question of national consensus. The concern of government to provide a protected area of nonparticipation is unrelated to individual political disagreements with foreign policy; rather, the concern of government in this area has traditionally been to secure the individual from the dilemma of choosing between the demands of temporal power and those derived from higher spiritual sources, "external" to the individual.

The second notable characteristic of the 1917 exemption is its limitation to *pacifist* religious sects. Two aspects of this limitation are worthy of consideration. It should be apparent that religious opposition to war is not necessarily synonymous with pacifism. Thus, the objector may contend that his opposition is derived from a compelling faith that the Biblical injunction, "What, therefore, God has joined together let no

⁵ For a discussion of the early history of concern for the conscientious objector, see U.S. Selective Service System, Monograph No. 11, *Conscientious Objection* (1950); Conklin, "Conscientious Objector Provisions: A View in the Light of *Torcaso v. Watkins*," 51 Geo. L.J. 252 (1963); Russell, "Development of Conscientious Objector Recognition in the United States," 20 Geo. Wash. L. Rev. 409 (1952).

⁶ 40 Stat. 78 (1917), repealed by 49 Stat. 878 (1935).

man put asunder,"⁷ means that a married man shall not serve in the military.⁸ Or, he may claim that the defeat of Agog by Gog prophesized in the Bible is imminent; that Gog is the United States and Agog the Communist forces, and thus to go to war would offend the commands of the Bible.⁹ Certainly, these are in one sense religious objections to war.¹⁰ The point is that the traditional concern has been for the *pacifist* objector: the objector who feels a religious abhorrence for the taking of life.

It may be protested, however, that such a belief is not synonymous with membership in a pacifist *sect*. This brings to the forefront the second aspect of the pacifist limitation: namely, administrative convenience. The problems involved in determining the scope of "religious" opposition to war, as well as the sincerity of individual belief, need hardly be mentioned. The attractive nature of establishing an "objective" test thus was no doubt a crucial factor in establishing the limitation.¹¹ Its basic unfairness, aside from constitutional questions, was early recognized, however, and by a directive of the Secretary of War the limitation to pacifist sects was rejected in favor of a broader exemption.¹²

In 1940 the Selective Service Act was subjected to an intensive reexamination. As originally conceived, section 7(d) of the Burke-Wadsworth Bill would have substantially reenacted the exemption for members of historic peace churches. In committee hearings, however, it was strongly urged that minority elements of nonpacifist churches interpreted the Biblical position on the taking of life in a manner in-

⁷ Matthew 19:6.

⁸ See Smith & Bell, "The Conscientious Objector Program—A Search for Sincerity," 19 U. Pitt. L. Rev. 695, 708 (1958).

⁹ Id. at 708-09.

¹⁰ The Jehovah's Witnesses' opposition to any but "theocratic wars" constitutes a unique problem. This has been held not inconsistent with the requisite opposition to "real shooting wars." *Scirella v. United States*, 348 U.S. 385 (1955).

¹¹ Secretary of War Newton D. Baker testified before the House Military Affairs Committee with respect to the exemption in the 1917 act. He stated, in part:

The religious-belief section is changed from that which you have in the National Defense Act, and which, in my judgment, is inoperable. In the National Defense Act you have an exclusion of any person who has conscientious beliefs against the bearing of arms That, of course, makes the question of exclusion purely a question of individual statement, and as lawyers might say, of a self-serving declaration made after the event. We recommend that the provision be modified so as to exclude or exempt those who are actually members of a recognized society which has, as one of its tenets, the disapproval of war.

Hearings on the Selective Service Act Before the House Committee on Military Affairs, 65th Cong., 1st Sess. 9 (1917). Cf. *United States v. Ballard*, 322 U.S. 78 (1944).

¹² U.S. Dep't of War, Statement Concerning the Treatment of Conscientious Objectors in the Army 39 (1919):

The Secretary of War directs that until further instructions on the subject are issued "personal scruples against war" shall be considered as constituting "conscientious objection" and such persons should be treated in the same manner as other "conscientious objectors"

distinguishable from the historic peace churches.¹³ Thus there was strong pressure to yield ground on administrative convenience ("objectivity") in order to afford a more meaningful exemption for those theistically opposed to war.¹⁴

The American Civil Liberties Union, taking an even stronger stand, suggested that the 1917 act be amended so as to exempt those "conscientiously opposed to participation in war in any form."¹⁵ The Society of Friends, instead, submitted a proposed amendment which exempted the objector "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."¹⁶ This latter phrasing was incorporated into the bill which came out of committee and was subsequently passed. Section 5(g) of the 1940 act provides:

Nothing contained in this act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.¹⁷

The key phrase, of course, is that which comprises the distinction between the respective suggestions of the ACLU and Society of Friends: "by reason of religious training and belief." Divergent interpretations developed fairly rapidly in the Second and Ninth Circuits.

It could have been argued either way, from the record in *United States v. Kauten*,¹⁸ as to whether the petitioner's opposition was "political" or "religious." He seemed to believe generally in passive resistance. However, much of his protest was directed specifically at World War II and the Roosevelt Administration. The Court upheld his conviction for failure to submit to induction. But in construing section 5(g) the Second Circuit formulated a test perhaps more appropriate to the rejected ACLU provision:

[T]he provisions of the present statute . . . take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption.¹⁹

In elaborating upon the distinction between opposition to a particular

¹³ See U.S. Selective Service System, *supra* note 5, ch. 4.

¹⁴ Note that even the 1917 act required personal agreement with the tenets of the pacifist religious organization. Thus, theoretically at least, even that proviso was not "objective."

¹⁵ Hearings on H.R. 10132 Before the House Committee on Military Affairs, 73d Cong., 3d Sess. 191 (1940).

¹⁶ *Id.* at 211.

¹⁷ 54 Stat. 889 (1940) (expired March 31, 1947) (now see 62 Stat. 613 (1948), 50 U.S.C. Appendix § 456 (j) (1964), reproduced in text accompanying note 30 *infra*).

¹⁸ 133 F.2d 703 (2d Cir. 1943).

¹⁹ *Id.* at 708.

war and "a conscientious scruple against war in any form," the court said:

The former is usually a political opposition while the latter, we think, may justly be regarded as a *response of the individual to an inward mentor, call it conscience or God*, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.²⁰ [Emphasis added.]

This language was, of course, dicta since petitioner *Kauten* failed to meet even this "liberal" test of exemption. However, the doctrine took on real meaning in later Second Circuit cases. In *United States ex rel. Phillips v. Downer*,²¹ the petitioner sought objector status on the basis of his belief that "war is ethically and inevitably wrong." He remembered various church teachings but had also read extensively in social philosophy and history from "Plato to Shaw." He asserted:

But from whom I derived my opposition to killing men—which I judge to be the objective of "combatant military service"—I cannot specifically say. Yet the fact remains that I have this opposition.²²

Held, petitioner's objection was "religious" rather than "political" within the *Kauten* dichotomy.

Similarly, in *United States ex rel. Reel v. Badt*,²³ petitioner based his beliefs on readings of history and other studies while in school. The court definitively stated its test, derived from *Kauten*, in granting petitioner's claim:

The relator can only secure exemption if it is found that the Director of Selective Service has held that he objected to "participation in any war under any circumstances because of the compelling voice of his conscience."²⁴

The Second Circuit view was rejected, however, by the Ninth Circuit. In *Berman v. United States*²⁵ the petitioner entered no claim of belief in God but offered considerable uncontested evidence to the effect that he held a sincere humanitarian belief that it was improper to wage war. The court held that there must be some manifestation of relationship to a supreme power distinct from and above human reason to come within the statute. Construing section 5(g), it quoted Chief Justice Hughes dissenting in *United States v. MacIntosh*²⁶ to the effect that "the essence

²⁰ Ibid.

²¹ 135 F.2d 521 (2d Cir. 1943).

²² Id. at 523.

²³ 141 F.2d 845 (2d Cir. 1944).

²⁴ Id. at 848.

²⁵ 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946).

²⁶ 283 U.S. 605, 633-34 (1931).

of religion is belief in a relation to God involving duties superior to those arising from any human relation."²⁷

The conflict was seemingly resolved by Congress. In 1948, section 5(g) was amended to include a definition of "religious training and belief" worded substantially in the terms of Chief Justice Hughes:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.²⁸

The Senate Report on the new provision cited, in explanation, *Berman v. United States*.²⁹ Thus had Congress seemingly closed the argument. But issue was soon drawn once more by conflict between the Second and Ninth Circuits. The former court, however, now made it clear that more than an ambiguity as to congressional intent was in question. For the first time questions of constitutional protection of religious freedom were explicitly discussed and decided contrary to the congressional enactment: the new section, 6(j), was declared unconstitutional by the Second Circuit.

In *United States v. Jakobson*,³⁰ the petitioner alleged that he came within the statutory language of section 6(j). He recognized an ultimate cause, which he called "Godness," but which could not be realized through any personal one-to-one "vertical" relationship in the traditional sense. Rather, it called for a "horizontal" relationship to one's fellow man:

The way to arrive closer to Godness is by approaching the universals inherent in existence. The individual must deal with life, death, health, love, time—the "givens" of existence stemming from the Ultimate Cause—as he finds them in himself and others.³¹

This view makes human existence holy—infused with Godness—and renders the taking of life sinful.³²

The court seemed to recognize that section 6(j) was intended to "beef up" *Kauten*, and that *Berman* envisioned a one-to-one vertical relation-

²⁷ *Berman v. United States*, 156 F.2d 377, 381 (9th Cir.), cert. denied, 329 U.S. 795 (1946).

²⁸ 62 Stat. 613 (1948), 50 U.S.C. Appendix § 456(j) (1964).

²⁹ S. Rep. No. 1268, 80th Cong., 2d Sess. (1948). The report is as follows:

This section re-enacts substantially the same provisions as were found in sub-section 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service (see *United States v. Berman*, 156 F.2d 377, cert. denied, 329 U.S. 795).

³⁰ 325 F.2d 409 (2d Cir. 1963), rev'd, 380 U.S. 163 (1965).

³¹ *Id.* at 413.

³² It should be understood that "sinful" in this context has no connotation of supernatural sanction. It becomes, rather, a question of being untrue to oneself and the meaning one attaches to existence.

ship. However, the court declared that such a rigid interpretation would conflict with *Torcaso v. Watkins*³³ (to be discussed later) and require the invalidation of the statute on constitutional grounds. Thus to avoid the constitutional question the statute was read broadly enough to cover petitioner Jakobson. *Kauten* and its progeny were thus resurrected.

In *United States v. Seeger*,³⁴ however, the same court faced the constitutional question squarely. In *Jakobson*, the petitioner had claimed the protection of section 6(j). Petitioner Seeger instead chose to attack section 6(j) outright.³⁵ He did not argue that section 6(j) applied to him. Rather, he argued its unconstitutionality on numerous grounds.³⁶ Although it was stipulated that Seeger's objection was "religious," the district court found him guilty of wrongfully failing to submit to induction. His unwillingness to answer in the affirmative the question on the conscientious objector form as to his belief in a Supreme Being was deemed sufficient for denial of his claim.³⁷

The Second Circuit reversed.³⁸ Petitioner had contended that:

Skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever . . . Such personages as Plato, Aristotle, and Spinoza evolved comprehensive ethical systems of intellectual and moral integrity without belief in God, except in the remotest sense.³⁹

Rejecting dependence upon the guidance of a Creator, Seeger maintained "more respect for . . . belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."⁴⁰

The court held it a deprivation of due process, under the fifth amendment, to classify on the basis of religion if such classification discriminated among religions. And the classification here discriminated between theistic and nontheistic religions. Violation of the first amendment, although alleged, was not discussed by the court.

The Ninth Circuit case of *Peter v. United States*,⁴¹ decided one month

³³ 367 U.S. 488 (1961).

³⁴ 216 F. Supp. 516 (S.D.N.Y. 1963), rev'd, 326 F.2d 846 (2d Cir. 1964), aff'd, 380 U.S. 163 (1965).

³⁵ It should be noted that the Seeger case was argued before the Jakobson case was decided. Thus, the broad construction of the statute in the latter case had not yet been announced.

³⁶ Petitioner contended that the statute conflicted with: (1) the due process clause of the fifth amendment; (2) the free exercise clause of the first amendment; and (3) article VI, § 3 (no religious test for United States office).

³⁷ In response to the query as to the petitioner's belief in a Supreme Being, he answered: Of course, the existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer "yes" or "no" . . .

United States v. Seeger, 216 F. Supp. 516 (S.D.N.Y. 1963).

³⁸ *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964).

³⁹ *Id.* at 848.

⁴⁰ *Ibid.*

⁴¹ 324 F.2d 173 (9th Cir. 1963), rev'd, 380 U.S. 163 (1965).

prior to *Jakobson*, cannot reasonably be distinguished on its facts from the two Second Circuit cases. Petitioner contended that his views came within section 6(j). At his trial he stated:

I think my actions are probably motivated most thoroughly by a feeling of relationship and love towards other human beings and other living objects in the world, and in seeing these other living objects. I can narrow it down closer; I can define it as a belief in the mystery of the heart of them, the essence of being alive, and my respecting and loving this livingness in other objects and human beings.⁴²

The Ninth Circuit held that the appeals board had not been unreasonable in deciding that these beliefs did not constitute belief in a Supreme Being, as opposed to a personal moral code, as required by statute.

It would be erroneous to suggest that the courts had now come full circle back to the *Kauten-Berman* controversy which led to the congressional action of 1948. At that earlier date, the Supreme Court could remain silent in anticipation of a Congressional response to the conflict.⁴³ But, the Second Circuit had forced the issue in *Seeger*. For now it was no longer a question of the breadth of the exemption—upon which divergent views could, however reluctantly, be tolerated, even if congressional action was not forthcoming. In declaring 6(j) unconstitutional in *Seeger*, the Second Circuit provided the prospect of no exemption in that jurisdiction: presumably there could no longer be *any* claim of conscientious objector status in that circuit. If an issue were ever ripe for Supreme Court adjudication, it was in the present series of cases, and the Court accordingly granted certiorari, consolidating the three cases.

The Supreme Court entered the dialogue on March 8, 1965.⁴⁴ Taking the lead of the Second Circuit in *Jakobson*, it construed section 6(j) broadly so as to avoid the constitutional attack under the first amendment. The test of belief in a "Supreme Being," within the statutory language, was held to be:

A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption⁴⁵

⁴² *Peter v. United States*, 324 F.2d 173, 176-77 (9th Cir. 1963). Further, petitioner stated:

Since human life is for me a final value, I consider it a violation of moral law to take human life. I think I have reached this conclusion out of my reading of such writing as those of Blake (Christian mystic), Emerson, Whitman, and more modern poets who have touched on the question.

I consider this belief to be superior to my obligation to the state.
Id. at 174 n.2.

⁴³ Cf. discussion of "ripeness" in Bickel, *The Least Dangerous Branch* 143-56 (1962).

⁴⁴ *United States v. Seeger*, 380 U.S. 163 (1965).

⁴⁵ Id. at 176.

Under this test the claimed exemptions of each of the three petitioners was upheld.

There is a touch of irony to the case. Protest is common with regard to the poor craftsmanship of the present Court.⁴⁶ This alleged demigration of workman-like standards is almost inevitably tied in with a declamation of the "activism" of the Court: in fact, the two claims are often inseparable. *Seeger*, however, is a difficult case for the joint admirer of craftsmanship and judicial passivism: craftsmanship would have led to a lack of deference—section 6(j) would have been declared unconstitutional. Much was sacrificed to avoid this result.

The Court struggled mightily to read the 1948 amendment as other than a limitation of the exemption. It was properly pointed out that Congress intended to reenact "substantially" the same provision it had included in the 1940 act.⁴⁷ If that enactment was not entirely unambiguous, the rejection of the ACLU suggestion which omitted the "religious training and belief" proviso, the prior history of the scope of the exemption, and the specific reference to *Berman* in the 1948 amendment certainly suggest strongly that only "vertical" objectors, to use petitioner Jakobson's phrase, were intended.⁴⁸

The Court attempted to explain the congressional citation of *Berman* by reconciling *Kauten* with *Berman*:

For both *Kauten* and *Berman* hold in common the conclusion that exemption must be denied to those whose beliefs are political, social, or philosophical in nature, rather than religious. Both, in fact denied exemption on that very ground.⁴⁹

To thus merge *Kauten* and *Berman* under a single principle consonant with section 6(j) is little more than to say that in both cases the exemptions were denied. For any distinction between "philosophical belief" and a "personal moral code," on the one hand, and "religious belief," on the other, loses all meaning under the principle of *Kauten*.⁵⁰ This becomes

⁴⁶ See, e.g., Kurland, "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143 (1964).

⁴⁷ *United States v. Seeger*, supra note 44, at 176; S. Rep. No. 1268, 80th Cong., 2d Sess. (1948). The Court reads "substantially the same provision" as though it means "the provision as interpreted by *Kauten*." This seems wholly unwarranted. A more logical reading of this phrase would be that it, in effect, says that *Kauten* had misinterpreted the 1940 act and therefore the clause was being reenacted with a clearer expression of what had been intended.

⁴⁸ The Court points out that the term "Supreme Being" is substituted for "God" in the statutory subscription to the language of the *Berman* case. This, it is suggested by the Court, indicates an intention broader than that of the Ninth Circuit decision. These terms are not words of art. If Congress had intended this subtle change of meaning it would certainly have been easier to cite *Kauten* instead of *Berman* than simply to leave the matter open to speculation by substituting one imprecise term for another.

⁴⁹ *United States v. Seeger*, supra note 44, at 178.

⁵⁰ See quotes at text to notes 19-20 supra.

abundantly clear in *Badt*⁵¹ and *Downer*,⁵² the cases following *Kauten* and allowing the exemption. These cases are entirely ignored by the Court's opinion.

Interestingly, the Court commences its interpretation of section 6(j) by stating:

The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or *economic* considerations that war is wrong and that they will have no part in it.⁵³ [Emphasis added.]

Note that the Court restated the language of section 6(j) so that "economic" objection is substituted for "philosophical"—perhaps an indication of the discomfort with the dichotomy as applied to the present case. Simply stated, it is impossible to draw a rational distinction between religious belief and personal moral code or philosophy which covers the petitioners' beliefs⁵⁴ and still grant them exemption.⁵⁵

SOME PERSPECTIVES ON THE DECISION

The tortuous and strained reasoning of the Court was, it is suggested, its only alternative to holding section 6(j) unconstitutional. Justice Douglas opens his concurring opinion with the following remarks:

If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment.⁵⁶

Implicitly the opinion of the Court says as much. Complete invalidation of the objector exemption is the only alternative to the present construction.

Man, a reflective creature, forms a conceptual understanding of his relationship to the external phenomenological universe. It may or may not be a substantial guide to his everyday actions, but it is the sphere of belief which, in broadest principle, the free exercise clause was meant

⁵¹ Consider again the petitioner's claim for exemption, discussed at text following note 23 *supra*.

⁵² Consider again the petitioner's claim for exemption, discussed at text following note 21 *supra*.

⁵³ *United States v. Seeger*, 380 U.S. 163, 173 (1965).

⁵⁴ Consider again the petitioner's claims for exemption, discussed at text to notes 30-42 *supra*.

⁵⁵ The Court quotes with favor from Paul Tillich:

And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, "of what you take seriously without any reservation." Perhaps, in order to do so, you must forget everything traditional that you have learned about God. . . . [Quotation marks added for emphasis.]

United States v. Seeger, *supra* note 53, at 187, quoting Tillich, *The Shaking Foundations* 57 (1948).

⁵⁶ *Id.* at 188. Justice Douglas alone concurred separately. There were no dissents.

to protect. The heart of the principle expressed by the clause is that state authority shall not discriminate against a man because of the particular manner in which this belief manifests itself in his cognitive system. To *limit* the resultant freedom to *any* combination of beliefs is simply a contradiction in terms.

A distinction must be drawn here between restrictions on one's *tenets* of belief and restrictions on one's *system* of belief. From an early date, it has been recognized that where tenets of belief conflict with an important societal value the former may necessarily have to be limited: freedom from restriction is not in this sense absolute.⁵⁷ However, where the restriction is directed at one's system of belief it is an entirely different matter and, it is suggested, an absolute protection is proper. It is one thing to validate a legislative judgment that the requirements of national security are sufficiently vital to justify a conscientious objection only if it is on the basis of an opposition to the taking of life;⁵⁸ it is quite another matter to draw the limitation in terms of the *ontological* basis for the opposition to the taking of life. The legislative judgment, in the latter case, is predicated upon just that presumption which the free exercise clause is meant to deny: that one view of man's relationship to the universe is more desirable than another.

It is suggested, then, that it was these constitutional considerations which led the Court to construe the statute in the chosen manner. Certainly the wording of the Court-established test for granting the exemption—whether the claimant asserts a “belief which occupies in the life of its possessor a place parallel to that filled by the God of admittedly qualified objectors”—seems consistent with these suggestions.

Whether the dialogue will continue is, of course, now in the hands of Congress. Three possible courses of action are possible. (1) If dissatisfied with *Seeger*, and out of patience with the courts, Congress could abolish the exemption altogether. It seems quite certain that this would raise no constitutional problems.⁵⁹ On the other hand, it would raise

⁵⁷ See *Reynolds v. United States*, 98 U.S. 145 (1878).

⁵⁸ See discussion in text accompanying and preceding note 10 *supra*.

⁵⁹ The question of whether “any” exemption for conscientious objectors is constitutionally compelled raises quite different problems from the question of whether a “particular” exemption offends the first amendment. A number of cases have indirectly considered the former question and uniformly answered in the negative. Petitions for naturalization were denied in both *United States v. Schwimmer*, 279 U.S. 644 (1929), and *United States v. MacIntosh*, 283 U.S. 589 (1931), because the petitioners refused to give an unqualified affirmation of their willingness to bear arms for the country. In both cases it was assumed that the granting of any exemption was strictly an exercise of congressional discretion. See also *United States v. Bland*, 283 U.S. 636 (1931). *Girouard v. United States*, 328 U.S. 61 (1946), overruled these cases, but only on the question of statutory interpretation. It was held that, in the absence of clear congressional intent, it should not be assumed that a willingness to bear arms was a prerequisite to taking the oath to support the Constitution. Subsequently Congress provided for the alien conscientious objector petitioning for citizen-

considerable political opposition, and must be assessed as highly unlikely.⁶⁰ (2) If dissatisfied with *Seeger*, Congress could limit the exemption to those who oppose military service on the basis of their belief in a traditional concept of God—clearly spelling out the “vertical” nature of the limitation, and expressly rejecting *Seeger*. This would force the constitutional question and, as suggested above, would almost certainly lead to judicial invalidation of the objector proviso. Thus, in fact, the only alternative to *Seeger* is no exemption. (3) If satisfied with *Seeger*, Congress can simply let it stand. This seems most likely. Political opposition to the case will undoubtedly be *de minimis*. It is highly unlikely that the new standard will significantly raise the number of exemptions.⁶¹ And, finally, the administrative difficulties involved are probably highly exaggerated.⁶² On the latter score it should be remembered that “religious training and belief,” even in the *Berman* sense, required neither formal church membership nor informal affiliation.

How broad is the exemption now? The Court said that:

No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases.⁶³

And, Justice Douglas, concurring, asserted that if petitioner were an atheist “a quite different problem would be presented,”⁶⁴ citing *Torcaso v. Watkins*.⁶⁵ It may be suggested that if petitioner were an “atheist”

ship in language parallel to § 6(j). See 66 Stat. 258 (1952), 8 U.S.C. § 1448(a)(5) (1964).

In *Hamilton v. Regents of University*, 293 U.S. 245 (1934), petitioner was denied exemption from compulsory classes in military training at the University of California. He claimed that such denial infringed upon his rights of conscience. The Court held that the University policy was proper, emphasizing that the conscientious-objector provision is a matter of legislative grace and not constitutionally required. A fortiori, a school might require classes in military training.

In *re Summers*, 325 U.S. 561 (1945), concerned a petitioner who was denied admission to the Bar on the basis of his unwillingness to bear arms. The Court affirmed, citing *Schwimmer*, *MacIntosh*, and *Hamilton* as precedent for the propriety of an absolute requirement of military service.

⁶⁰ Every denomination is anxious to protect this right of conscience, if only for its minority members. And, of course, libertarian organizations favor it.

⁶¹ In *re Summers*, *supra* note 59, wherein the petitioner was denied admission to the Bar on the basis of his conscientious objection to war, is perhaps an extreme example of a very real phenomenon: strong social disapproval of the conscientious objector. Cf. *United States v. Schwimmer*, *supra* note 59; *United States v. MacIntosh*, *supra* note 59. Although not directly relevant to the argument it is interesting to note that the estimated number of conscientious objector claims during World War I was less than one-half of 1% of the group liable for military service during that period.

⁶² The Selective Service System has the assistance of the FBI and the Justice Department for purposes of investigating the petitioner. Query, in any event, whether the sincerity of an exemption claim based on humanitarian beliefs is any more difficult to ascertain than an exemption claim based on a “personal” interpretation of the will of a traditional God.

⁶³ *United States v. Seeger*, 380 U.S. 163, 173-74 (1965).

⁶⁴ *Id.* at 193 n.2.

⁶⁵ 367 U.S. 488 (1961).

quite the same problems would be presented and, in fact, the answers have been settled by *Seeger*. The term "atheist" which is in itself hopelessly vague, is totally irrelevant after *Seeger*.

It has been suggested above that *Seeger*, despite its purported reliance on statutory construction, is in reality a recognition that the free exercise clause, in the broadest interpretation of principle, tolerates no distinctions among systems of belief. The opinion raises, and settles, the question: why should the man whose "religion" is grounded on a belief in a mystical and brotherly "goodness" as an essence in the soul of every man be less free to maintain his system of belief than the man believing in a more traditional concept of God? Surely the principle of religious freedom embodied in the first amendment is broad enough to protect both. *Torcaso v. Watkins*⁶⁶ is merely an extension of this principle. In *Torcaso*, petitioner was denied certification as a notary public on the basis of his refusal to comply with the statutory requirement that he affirm his belief in the existence of God. The Court found the statute in conflict with the protection afforded petitioner by the first amendment. In an oft-quoted phrase, the Court asserted:

Neither [state nor federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on a different belief.⁶⁷

This is one of innumerable instances of vagaries resulting from the unwillingness of the Court to clearly define—or even explicitly recognize—the relationship between the establishment and free exercise clauses.⁶⁸ It is quite beside the point that the oath requirement in *Torcaso* might have had some highly improbable and oblique tendency to "aid all religions." Surely the heart of the matter is the burden on petitioner *Torcaso*, rather than some highly speculative benefit. And, in this connection, it is equally confusing to characterize *Torcaso* in terms of protection of the "atheist," whatever that term may mean.

The crucial point is that petitioner *Torcaso* was discriminated against because he refused to affirm a belief in God—nowhere does the opinion of the Court refer to him as an "atheist"—and the necessity of such affirmation could be inconsistent with any number of "religious" stances

⁶⁶ *Ibid.*

⁶⁷ *Id.* at 495.

⁶⁸ See the protest, on this score, of Justice Stewart, concurring in *Sherbert v. Verner*, 374 U.S. 398, 413-17 (1963). Although perhaps less obvious in that case than Justice Stewart would lead one to believe, the problem is often most perplexing. See, e.g., *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965). See generally Katz, "Freedom of Religion and State Neutrality," 20 U. Chi. L. Rev. 426 (1953); Kurland, "Of Church and State and the Supreme Court," 29 U. Chi. L. Rev. 1 (1961).

protected by a liberal reading of the first amendment.⁶⁹ Torcaso may have adhered to a system of belief synonymous with that of Seeger, or Peter, or Jakobson—any one of which would have been consistent with his refusal to take the oath. If so, the question is again: what basis is there, consistent with the first amendment, for burdening such a system of belief?

If *Torcaso*, then, offers no added assistance in assessing the protection of the "atheistic" conscientious objector, this is not to say that no assistance exists. *Seeger* itself offers the answer.

What is an "atheist"? In most cases the thoughtful skeptic will base his lack of belief on the absence of proof or evidence of a God. Ordinarily such a person will readily admit that he has no "absolute proof" that there is no God. Thus, to be consistent, he must substantially echo the assertion of petitioner Seeger—that the question is unanswerable even if it appears most probable that there is no Deity. The question then becomes one of his particular system of belief and the local board is faced with one of the infinite variations exemplified by the petitioners in *Seeger*. Thus, unless the Court had in mind someone who adamantly refuses to admit the possibility of a Deity, it set aside for future deliberation an imaginary question.

And what of the militant absolute disbeliever? Either he adheres to one of the variations on the theme of universal, humanistic Goodness or else his views are such that he cannot qualify for exemption in any event. In other words, unless he professes the sort of venerating attitude toward human life which sounds like a "Supreme Being" as now defined, he does not qualify for the statutory exemption afforded those who are conscientiously opposed to the taking of life, and if he does adhere to such a system of belief he, ipso facto, is not an "atheist." Thus, for purposes of conscientious objection, there is but one necessary and sufficient condition: a fundamentally based opposition to the taking of life. Absolute vertical disbelief in the traditional sense—disbelief in God—is irrelevant.

SOME BROADER IMPLICATIONS

Two broader questions follow from the discussion which, up to this point, has largely centered around the military conscientious objector exemption. It was suggested earlier that an absolute protection against discriminations among systems of belief is most consonant with the principle of the free exercise clause. This view must be examined in

⁶⁹ The state court similarly characterized the case in terms of unwillingness to affirm, rather than atheism. *Torcaso v. Watkins*, 223 Md. 49, 162 A.2d 438 (1960).

greater detail. Also, the general problem of "disbelief" and its relationship to the first amendment guarantee will be considered.

1. *Discrimination Among Systems of Belief*

The test for exemption suggested in the *Seeger* opinion is almost exactly that which was applied in the California case of *Fellowship of Humanity v. County of Alameda*.⁷⁰ That case and *Washington Ethical Society v. District of Columbia*⁷¹ both concerned statutes which provided tax exemptions for buildings used for "religious worship." The question in each was whether the petitioner qualified for the exemption, considering the activities for which each used its facilities. In both cases, the activities were essentially "humanistic"—an exploration of the nature of man, his diverse activities and interests, his quest for unity and something more than merely himself. Neither group, however, insisted upon or formally recognized the existence of any form of deity or Supreme Being.

In both cases the exemptions were granted. In the *Ethical Society* case the rationale was vague and formalistic. The California court, on the other hand, formulated the following test:

[T]he only inquiry in such a case is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves.⁷²

Such a test follows logically from a view of religious freedom expansive enough to recognize that the individual system of belief—call it religion, philosophy, or personal moral code—is entitled to the same protection as traditional religious belief. The court went on to say that:

[R]eligion fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief.⁷³

Is every potential classification among systems of belief now either necessarily subject to construction in line with the California-*Seeger* test or else unconstitutional?

The Maryland Code, which provided for the affirmation of belief in God held unconstitutional in *Torcaso*, also provides:

⁷⁰ 153 Cal. App. 2d 673, 315 P.2d 394 (Dist. Ct. App. 1957).

⁷¹ 249 F.2d 127 (D.C. Cir. 1957).

⁷² *Fellowship of Humanity v. County of Alameda*, supra note 70, at 692, 315 P.2d at 406. Questions of abridgment of religious freedom under the state constitution were raised in the case, but the court was addressing itself to the first amendment in suggesting the present test.

⁷³ *Id.* at 692-93, 315 P.2d at 406.

[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts and be rewarded or punished therefore either in this world or the world to come.⁷⁴

The rationale for this provision is, of course, evident in its final clause. However, similar arguments on the alleged rational purpose of a requirement of external "vertical" belief in *Seeger* and *Torcaso* were to no avail.⁷⁵ The infirmity in each of these cases is that the argument for upholding the statute rests on a rationale which is directly contrary to the asserted principle of first-amendment protection. In other words, any distinction suggested on the basis of system of belief per se must contend that there is intrinsic merit in some systems which is not present in others.

It is this factor which distinguishes this line of cases from the long line of Jehovah Witnesses' cases,⁷⁶ the Sunday-closing-law cases,⁷⁷ and *Sherbert v. Verner*,⁷⁸ among others. These latter cases require a balancing process involving a secularly based statute with a secular rationale which, unfortunately, places burdens upon religious freedom, to a greater or lesser extent.

Thus in *Sherbert v. Verner*—which upheld the claims of petitioner to first-amendment protection—a Seventh Day Adventist protested the refusal of the state to pay her unemployment compensation because of a statutory requirement that she be "available for work." She refused to accept Saturday employment on the basis of her sabbatarian practice. The unsuccessful argument for upholding the statute as applied to her was: (1) "availability for work" is a reasonable qualification for the benefits, and (2) an exception in favor of religious objectors would be administratively unmanageable.

It is certainly arguable whether *Sherbert*, where the petitioner received the benefit of first-amendment protection, is distinguishable from the Sunday-closing-law cases, where the secular purpose of the statute was upheld.⁷⁹ And, the expression of an all-encompassing rationale for

⁷⁴ Md. Const., Declaration of Rights, art. 36 (1957).

⁷⁵ It can be argued in favor of a "Supreme Being" limitation, in the traditional sense, that only higher external commands create a degree of conflict in the individual so serious that state authority should be curtailed. It can be argued in favor of the requirement that a notary public affirm a belief in God that the nature of the office—attesting oaths—requires an individual to whom the oath is supernaturally endowed.

⁷⁶ For a discussion of these cases, see Kurland, *supra* note 68, at 36-62.

⁷⁷ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

⁷⁸ 374 U.S. 398 (1963).

⁷⁹ See *id.* at 417-18 (Stewart, J., concurring); *id.* at 421 (Harlan, J., dissenting).

the Jehovah Witnesses cases is no mean feat.⁸⁰ The task is clear however: the secular purpose—be it public safety, public rest, public peace and quiet—must be balanced against the burden placed upon the tenets of religious belief by the statutory proscription.

Seeger and related cases, however, are of a different nature. The rationale for section 6(j) is neither freedom of conscience, which suggests the desirability of *some* exemption, nor the national security, which suggests *some limitation* on the exemption. It is rather, a legislative judgment that for purposes of exemption certain systems of belief are by their very nature superior to others. *Torcaso* and the tax exemption cases involve the same issue. The constitutional infirmity in these cases—unless the statute is to be read broadly to avoid the problem—is such that no balancing test is required.⁸¹

2. *Disbelief*

The question of first-amendment protection for the “atheist” can best be clarified by returning for a moment to consideration of the military conscientious objector. Consider the possibility that Congress enacted a provision excluding “atheists” from the protection of section 6(j) as now construed. It follows from the earlier discussion that the constitutional question would never be reached. Either the petitioning “atheist” would not qualify *in any event* for the exemption because his beliefs fell outside the purview of those exhibiting the requisite opposition to the taking of life (petitioner Kauten, for example), or the petitioner would qualify for exemption because of the necessarily limited construction of “atheist” if that provision is to be read consistently with section 6(j). The new section would thus be superfluous.

The broader implications herein can be illustrated by considering another example. A suggested amendment, later rejected, to the unfair

⁸⁰ See, e.g., *Kurland, Religion and the Law: Of Church and State and the Supreme Court 50-74* (1962).

⁸¹ A recent case illustrates the same problem in a different context. In *Kolbeck v. Kramer*, 84 N.J. Super. 569, 202 A.2d 889 (Super. Ct. L. 1964), plaintiff sought admission at Rutgers, the State University. A state statute provided that any student might be excluded who refused to be vaccinated except “if the proposed vaccination interferes with the free exercise of his religious principles.” The University excepted Christian Scientists under this provision but refused to except plaintiff, whose view was based upon a family personal belief “that it was God’s Word or belief in God which would keep them healthy.” He was refused admittance. The court compelled his admission. The statutory compulsion with respect to vaccination could have been absolute but it was not, and since it was not it could not be applied so as to discriminate between religious beliefs. It was so applied in the present case, held the court, because the plaintiff was denied coverage solely on the ground that he was not a Christian Scientist.

The action of the University in the present case is an interesting example of the real significance of the constitutional protection involved. In denying the plaintiff admission to the University, they gave him a certificate to have filled out by the Christian Science Church attesting to the fact that he was a member in good standing of that Church.

employment practices section of the Civil Rights Act would have provided that: "It shall not be unlawful employment for an employer to refuse to hire . . . because of said person's atheistic practices and beliefs."

Assume that an employer were to use the provision as a defense against an alleged unfair employment practice claim of a prospective employee. The employee further alleges the unconstitutionality of the proviso as infringing the protection afforded him by the first amendment.⁸² A final assumption will make the problem clear: assume further that the aggrieved employee adheres to the same system of belief as petitioner Seeger. Are such beliefs constitutionally protected from discrimination in the granting of a military exemption but statutorily subjected to the possibility of discrimination in obtaining employment? This would certainly be a tortured application of the broad principle of protection of free exercise suggested. And, what justification could there be for it?⁸³ The suggestion is, quite simply, that any classification in terms of "atheists" is devoid of meaning.⁸⁴

In order to protect unorthodox systems of belief it is necessary to reject the traditional definition of "atheist" as one who does not believe in God.⁸⁵ But this raises unanswerable questions: If the suggested unfair employment practices amendment did not mean that the employer could refuse to hire someone who did not believe in God, what does it mean? What more closely restricted class would bear any reasonable relationship to an employer's hiring practices? The statute, in effect, would be a nullity because the term "atheist" has lost its meaning.

In general, then, it is suggested that the traditional definition of the term "atheist" is inconsistent with the protection afforded systems of belief under the expanding interpretation of the free exercise clause.

CONCLUDING OBSERVATIONS

Seeger is an example of a hard case making good law but paying a high price in judicial craftsmanship. An explanatory factor is the peculiar

⁸² Torcaso would, of course, present the same problems if the statute were phrased in terms of exclusion of "atheists" from office.

⁸³ Note that the naturalization provisions, which for many years presented just such a disparity (see note 59 *supra*), are now worded such that the necessity of taking an oath to bear arms in defense of the country is conditioned in the same manner as the compulsion to serve in the armed forces. 66 Stat. 258 (1952), 8 U.S.C. § 1448(a)(5) (1964); see *In re Hansen*, 148 F. Supp. 187 (D. Minn. 1957); cf. *Girouard v. United States*, 328 U.S. 61 (1946).

⁸⁴ Cf. *Baggett v. Bullitt*, 377 U.S. 360 (1964), where it was held that oath requirements applied to state employees relating to loyalty to government and government institutions, and to subversive activities, were unconstitutionally vague—offensive to due process.

⁸⁵ Webster defines atheism as "a disbelief in the existence of God or any other deity." Webster's Third New International Dictionary (1961).

context in which *Seeger* arose. The general problem of classifications among systems of belief arises only when a society has acquired a relatively high degree of tolerance and sophistication. In the past, tolerance has too often been circumscribed in terms of "God," "religion," "Supreme Being"—terms easily susceptible to interpretation so as to substantially qualify the "toleration" they imply. Thus, statute and judicial decision offer long-standing precedent contra to the principle embodied in *Seeger*, *Torcaso*, and like cases.

Seeger offers a necessary guarantee: that the individual's system of belief will be subjected to no value-oriented order of priorities vis-à-vis other systems of belief. The fact that this viewpoint may be foreign to the "religious" notions of the founding fathers is irrelevant to a liberal view of the principle which they established: that every man's moral conceptualization of existential phenomena is entitled to the same respect from state authority.